PRIYAMAS EXPORT CORP SDN BHD

v.

BANK BURUH (MALAYSIA) BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-858-1995]
4 JUNE 1998

CIVIL PROCEDURE: *Judgments and orders - Consent order - Setting aside consent order and settlement agreement - Whether judge aware of issues concerning validity and court's jurisdiction - Whether party to consent order estopped from challenging validity - Whether consent given freely*

LAND LAW: *Charge - Discharge of - Whether charge can be discharged by private agreement - Whether against public policy - National Land Code 1965*

CIVIL PROCEDURE: *Res judicata - Judgment - Judgment in other proceedings - Whether issue can be challenged in different proceedings*

The appellant ('the plaintiff') had entered into a settlement agreement ('the agreement') and consent order dated 1 March 1991 with the respondent ('the defendant'). The other parties to the agreement and consent order were Selvam Holdings (M) Sdn Bhd ('Selvam Holdings') by its receiver and manager, and one Cecilia Sarah J Selvam. Under the terms of the agreement and consent order, the parties agreed, *inter alia,* that all civil proceedings between the parties would be discontinued and that certain pieces of real property, some of which had been charged to the defendant by the plaintiff and were the subject matter of dispute ('the property'), would be dealt with according to the agreed terms of settlement.

The plaintiff later applied to have the agreement and consent order set aside on the grounds, *inter alia,* that they were in contravention of the National Land Code 1965 and therefore void for being against public policy and that the receiver of Selvam Holdings did not have the capacity to execute the agreement as his appointment was invalid.

At the trial, counsel for the defendant raised two preliminary issues, one of which was that since the agreement involved other parties, it was imperative that those parties be joined. The judge dismissed this preliminary objection on the basis that the plaintiff would be calling the relevant parties as witnesses. However, none of the parties were in fact called, and the judge invoked the adverse inference rule against the plaintiff under s. 114(g) of the Evidence Act 1950.

The judge dismissed the application and the plaintiff appealed.

Held:
Per Haidar Mohd Noor JCA

[1] The onus was on the plaintiff to call the relevant witnesses as promised. It could not act on behalf of the other parties who chose not to intervene in the proceedings.

[2] The judge was well aware of the issues concerning the validity of the agreement and consent order and also the issue concerning the jurisdiction of the court to make the consent order. He was, however, correctly of the view that all the issues had been raised in earlier proceedings and that they had been amicably and conclusively resolved as per the agreement.

[3] On the facts, the plaintiff was estopped from challenging the validity of the agreement and consent order. The plaintiff freely gave its consent to the agreement and that consent was not given under any misapprehension or by reason of a misstatement or want of materials.

[4] There is nothing to prevent a chargor from selling charged property with the consent of the chargee. No order for sale under the National Land Code 1965 had been given by the court prior to the consent order being entered. It was therefore well within the rights of the parties to deal with the property privately on agreed terms as was done in the agreement and consent order.

[5] The winding-up order against Selvam Holdings had been conclusively held to be valid in other proceedings. Consequently, the appointment of the receiver was clearly valid and proper. It was not for the plaintiff to relitigate this issue in these proceedings. The proper course would be to appeal against the previous order.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu ('plaintif tersebut') telah memasuki satu perjanjian penyelesaian ('perjanjian tersebut') dan perintah persetujuan bertarikh 1 Mac 1991 dengan responden ('defendan tersebut'). Pihak yang lain kepada perjanjian serta perintah persetujuan tersebut adalah Selvam Holdings (M) Sdn Bhd ('Selvam Holdings') melalui penerima dan pengurusnya, dan seorang bernama Cecilia Sarah a/p J Selvam. Di bawah terma-terma perjanjian dan perintah persetujuan tersebut, pihak-pihak itu telah bersetuju, antara lainnya, bahawa kesemua prosiding antara pihak-pihak tersebut akan dihentikan dan sebilangan harta tanah yang tertentu, sebahagiannya telah digadaikan kepada defendan oleh plaintif dan merupakan hal-perkara yang dipertikaian ('hartanah tersebut'), akan diuruskan menurut terma-terma penyelesaian yng dipersetujui.

Plaintif kemudiannya telah memohon supaya perjanjian dan perintah persetujuan itu diketepikan atas alasan, antara lainnya, bahawa mereka melanggaran Kanun Tanah Negara 1965 dan dengan itu adalah batal kerana bertentangan dengan dasar awam dan bahawa penerima Selvam Holdings tidak mempunyai keupayaan untuk menyempurnakan perjanjian tersebut kerana perlantikan beliau tak sah.

Di perbicaraan tersebut, peguam bagi pihak defendan telah membangkitkan dua isu awal, salah satu daripadanya adalah bahawa oleh kerana perjanjian itu melibatkan pihak-pihak yang lain, ianya sangat mustahak bahawa pihak-pihak itu hendaklah digabongkan. Hakim telah menolak bantahan awal ini atas dasar bahawa plaintif akan memanggil pihak-pihak yang relevan sebagai saksi. Walaubagaimanapun, tidak satu pun daripada pihak itu telah pada hakikatnya dipanggil, dan hakim akan menggunakan inferens bertentangan terhadap plaintif di bawah s. 114(g) Akta Keterangan 1950.

Hakim telah menolak permohonan tersebut dan plaintif telah merayu.

Diputuskan:

Oleh Haidar Mohd Noor HMR

[1] Bebanan adalah di atas plaintif untuk memanggil saksi-saksi yang relevan sepertimana yang dijanjikan. Ianya tidak boleh bertindak bagi pihak-pihak yang lain itu yang telah memilih untuk tidak mencelah dalam prosiding tersebut.

[2] Hakim amat mengetahui mengenai isu-isu berhubung dengan keesahan perjanjian dan perintah persetujuan itu dan juga isu berhubung dengan bidangkuasa mahkamah untuk membuat perintah persetujuan itu. Beliau telah, walaubagaimanapun, sesungguhnya berpendapat bahjawa kesemua isu-isu tersebut telah dibangkitkan dalam prosiding yang awal dan bahawa

ianya telah diselesaikan secara berbaik-baik dan dengan muktamadnya menurut perjanjian tersebut.

[3] Berdasarkan fakta-fakta, plaintif diestop daripada mencabar keesahan perjanjian tersebut dan persetujuan itu telah tidak diberikan di bawah sebarang salah anggapan atau disebabkan oleh salah nyataan atau ketiadaan bahan.

[4] Tidak terdapat apa-apa untuk menghalang penggadai menjual hartanah yang tergadai itu dengan persetujuan pemegang gadaian. Tiada perintah untuk jualan di bawah Kanun Tanah Negara 1965 telah diberikan oleh mahkamah sebelum perintah persetujuan dimasukkan. Ianya dengan itu sesungguhnya dalam lingkungan hak pihak-pihak tersebut untuk berurusan dengan hartanah tersebut secara persendirian atas terma-terma yang telah dipersetujui sepertimana yang telah dlakukan dalam perjanjian dan perintah persetujuan tersebut.

[5] Perintah penggulungan terhadap Selvam Holding telah diputuskan secara muktamadnya sebagai sah dalam prosiding yang lain. Berikutan itu, perlantikan penerima adalah jelas sah dan menurut aturan. Ianya bukan tidak wajar bagi plaintif melitigasikan semula isu ini dalam prosiding ini. Jalan yang wajar adalah untuk merayu terhadap perintah yang terdahulu itu.

[Rayuan ditolak.]

Cases referred to:
Chee Kuan Cheng v. Chua Kong Kah [1967] 2 MLJ 76 ***(refd)***
Ganapathy Chettiar v. Lum Kum Chun & Ors [1981] 2 MLJ 45 ***(foll)***
Khan v. Golechha International Ltd [1980] 1 WLR 1482 ***(foll)***
MUI Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229 ***(foll)***
Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam [1995] 1 AMR 139 ***(refd)***
Toh Seow Ngan & Ors v. Toh Seek Keng & Ors [1990] 2 CLJ 15 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 33

Other source referred to:
Doctrine of Res Judicata, 2nd edn 1969, p 38, para 42

For the appellant - K Jaya Simbun (CV Khrishnadevan with him); M/s Jaya Simbun Khrishna & Co
For the respondent - KS Narayanan (Saranjit Singh with him); M/s KS Narayanan Assoc

Reported by Anne Khoo

JUDGMENT

Haidar Mohd Noor JCA:

Priyamas Export Corporation Sdn. Bhd., the plaintiff (appellant), filed an action in the High Court (Commercial Division), Kuala Lumpur *vide* suit no. D5-22-1185-1992, against Bank Buruh (Malaysia) Berhad, the defendant (respondent), praying for:

(i) A declaration that the **purported consent order** dated 1.3.91 and the purported settlement agreement dated 27.2.1991 executed by the plaintiff and the defendant is **null and void** and be set aside;

(ii) the sum of $600,000.00;

(iii) damages;

(iv) an order that the defendant do forthwith return the titles held under EMR 3955, Lot 1040, Mukim of Petaling and EMR 5687, Lot 1438, Mukim of Batu together with the blank transfer forms executed by the plaintiff **and a registrable discharge of the defendant's charges over these properties**;

(v) interest on (ii) and (iii) above at the rate of 8% p.a., from 15.3.1991 to the date of judgment;

(vi) interest on (v) above at the rate of 8% p.a from the date of judgment to the date of realisation;

(vii) costs; and

(viii) such further and other relief as this Honourable Court may deem fit to grant.

The learned judge dismissed the plaintiff's action with costs. Hence the appeal.

We dismissed the appeal with costs. We now set out our reasons.

It would appear from the judgment of the learned judge that the plaintiff was rather uncertain of the directions that it should take in the proceedings.

By way of a summons in chambers dated 16 August 1994, the plaintiff had asked for leave to withdraw the action and for such other order the court deemed fit. However, at the hearing of its application on 21 November 1994, the counsel for the plaintiff asked the court to determine the issue of the consent order and the settlement agreement before it proceeded with the withdrawal! This was strongly objected to by the counsel for the defendant

as the matter was ready for trial and in any event the points raised were not part of the pleadings unless amendments are made first. It was agreed by counsel that amendments should be made first and thereafter to file an application to determine the issue/issues raised. The application was then withdrawn by consent with costs in the cause.

Subsequently, the plaintiff filed a summons in chambers upon a certificate of urgency on 9 May 1995 to obtain leave of the court to refer questions of law pursuant to O. 33 of the Rules of the High Court 1980 (see p. 11 of the Appeal Record Vol. 1).

When the application came for hearing on 6 July 1995, the counsel for the plaintiff applied to withdraw the application with no order as to costs and by consent of counsel for the defendant, the court accordingly struck out the application.

At the hearing of the trial proper, the counsel for the defendant raised two preliminary objections, *viz:*

(a) since the consent order and the settlement agreement ought not to have been granted by the court and since they involved parties other than the plaintiff and the defendant, any declaration the court may eventually make would affect the rights of other parties involved. It was imperative that the other parties be made parties in this action;

(b) the plaintiff had taken a conflicting stand as regards case D4-22-1329-91 which was after the consent order and settlement agreement were entered into.

The plaintiff's counsel's reply was –

(a) there were only two other parties, one being the sister (Cecilia Sarah) of the plaintiff's director and main witness. She has not indicated her desire to participate in the proceedings and if need be, she could be called as a witness.

The other remaining party was Toby Lam ("Toby"), the receiver and manager of Selvam Holdings (M) Sdn. Bhd. whose name does not appear in the settlement agreement and he maintained that there was no such entity as the receiver and manager or liquidator of Selvam Holdings (M) Sdn. Bhd. He went on further to submit that it was a question of law and that a receiver and manager need not be made a party as he had no *locus standi* since his appointment was in issue.

Further the winding-up court had earlier held that Selvam Holdings (Malaysia) Sdn. Bhd. was not wound up. He reiterated that the winding-up was a nullity because of non-service and consequently there could not be any liquidator.

(b) In respect of case D4-22-1329-91 he explained that steps had been taken to withdraw it but no consent had been obtained and there was only the question of costs left. In any event he said that the proceedings were void as it was in the name of Selvam Holdings (M) Sdn. Bhd. which was a non-entity.

The learned judge dismissed the preliminary objections as he held that the disputed facts should properly be evaluated at a trial.

At the trial, the plaintiff called one witness, Jean Louis Jayaraj, its Managing Director (PW1). The defendant called Moorthy s/o Applanaidu, its Manager (DW1).

As the consent order and the settlement agreement recorded *vide* originating summons F31-4147-86 are now sought by the plaintiff to be set aside, it would then be appropriate to set out in full the consent order and the settlement agreement:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(CIVIL DIVISION)

ORIGINATING SUMMONS F31-4147-86

Between

Selvam Holdings (M) Sdn. Bhd. (under Liquidation) ... Plaintiff

And

Priyamas Export Corporation Sdn. Bhd. ... Defendant

And

Bank Buruh (M) Berhad ... Third Party

BEFORE THE HONOURABLE MR. JUSTICE DATO' N.H. CHAN THIS 1ST DAY OF MARCH 1991 IN CHAMBERS

ORDER

UPON HEARING Mr. P.S. Gill for the Plaintiff and Mr. Prasad Abraham for the Defendant and Mr. K.S. Narayanan for the Third Party.

AND BY CONSENT IT IS ORDERED THAT the terms of settlement having been agreed between the parties and the persons and company whose names are set out in the Settlement Agreement dated the 27th day of February 1991 and such terms having been presented to the Court initialled in the form annexed hereto by Counsels of the parties and representing also the other persons and companies referred to in the said terms, an Order be made in the terms and that a copy of such Settlement Agreement and that this Order be placed with the files of the proceedings hereinafter set out:

(1) Originating Summons No. F33/80 between Bank Buruh and J.K. Selvam & Roseline Selvam.

(2) Federal Court Civil Appeal No. 89/83 between J.L. Selvam & Roseline Selvam and Bank Buruh (M) Bhd.

(3) Civil Suit No. F94/82 between J.L. Selvam and Bank Buruh (M) Bhd.

(4) Originating Summons No. F30/84 between J.L. Selvam and Bank Buruh (M) Bhd.

(5) Originating Summons No. F408/84 between J.L. Selvam and Bank Buruh (M) Bhd.

(6) Originating Motion No. F17/84 between J.L. Selvam and Bank Buruh (M) Bhd., Francis Chong, Kamal Al Yaffi & Toby Lam & Arab Malaysian Development Bank.

(7) Civil Suit No. F7/84 between J.L. Selvam and Toby Lam & Bank Buruh (M) Bhd.

(8) Originating Summons No. F693/82 between Lymas Development Finance Corp. Sdn. Bhd. and Bank Buruh (M) Bhd.

(9) Originating Summons No. F1444/83 between Lymas Development Finance Corp. Sdn. Bhd. and Bank Buruh (M) Bhd.

(10) Civil Suit No. 536/79 between Bank Buruh (M) Bhd. and Selvam Holdings (M) Sdn. Bhd., Roseline Selvam, J.L. Selvam, Seenivasag Reddiar and Samuel Abishegam.

(11) Civil Suit No. 34/79 – Notice of Motion – Contributories of Selvam Holdings.

AND IT IS FURTHER ORDERED:

The 2 caveats on the property held under:

(1) Caveat Presentation No. 5184/86 Jilid 67 Folio 126 Lodged by Priyamas Export Corporation Sdn. Bhd. off 1429 Jalan E3/13 Taman Ehsan, 52100 Kepong, Kuala Lumpur on the 19th day of August 1986; and

(2) Caveat Presentation No. 1310/87 Jilid 77 Folio 114 Lodged by Cecilia Sarah d/o J. Selvam IC No. 3110309 c/o Murthi & Partners on the 16th day of March 1987

do stand discharged and cancelled.

AND IT IS FURTHER ORDERED that each of the proceedings listed above in this Order numbered (1) to (11) shall be deemed to be dismissed or discontinued in terms of paragraph 5 of the Settlement Agreement.

Dated this 1st day of MARCH 1991.

tt. SITI SALWA BT MUSA
Senior Assistant Registrar
High Court, Kuala Lumpur

ANNEXURE
SETTLEMENT AGREEMENT

This Settlement Agreement is made between:

(1) Bank Buruh (M) Bhd. of 14, Bangunan Kuwasa, 5, Jalan Raja Laut, 50350 Kuala Lumpur;

(2) the Receivers and Managers and Liquidators of Selvam Holdings (M) Sdn. Bhd.;

(3) Priyamas Export Corporation Sdn. Bhd (formerly known as Lymas Finance Corporation Sdn. Bhd.) of 1429, Jalan E3/13 Taman Ehsan, 52100 Kuala Lumpur.;

(4) Cecilia Sarah a/p J. Selvam in her personal capacity and for and on behalf of all the members of her family including J.L.J. Selvam and the beneficiaries of the Estate of the late Rosaline Selvam;

(5) Cecilia Sarah a/p J. Selvam for and on behalf of the Contributories of Selvam Holdings (M) Sdn. Bhd. in Kuala Lumpur Notice of Motion no. 34 of 1979; and

(6) M/s Priyamas Export Corporation Sdn. Bhd. and Cecilia Sarah a/p J. Selvam as Caveators of the land held under Lot No. 445, CT 15374 Mukim of Ulu Semenyih, District of Ulu Langat which is a subject matter of Kuala Lumpur High Court Civil Suit No. 31-4147-86.

IT IS AGREED BETWEEN THE PARTIES:-

That **subject** to the approval and consent of Court and in a move to amicably and conclusively resolve the disputes between the various parties hereinbefore referred to, it is hereby agreed as follows:-

1. The Bank and each of the parties hereinbefore referred to in the Settlement Agreement confirm that as on the 31st day of December 1990, the total sums outstanding and due to the Bank by M/s Selvam Holdings Sdn. Bhd. under the following loan accounts with the Bank namely, 241-1158, 55-5319, 55-5008 and Bills amounts to $13,400,000.00 which is inclusive of interest to that date (hereinafter referred to as the "agreed outstanding sums").

2. It is agreed and confirmed by the parties hereto that the land security now available to the Bank for repayment of the said outstanding sums under the said accounts are as follows:

   (1) **U.K. Heights Property**

   Title No. G.15817 Lot 4479 and Title No. C15818 Lot No. 4480, all in the Mukim of Ampang, District of Gombak, Selangor. (Land Area 15,347 sq. ft.). **Registered Owner** – M/s Selvam Holdings (M) Sdn. Bhd.

   (2) **Ipoh Road property**

   Lot No. 1438, EMR 5687, Mukim of Batu, District of Federal Territory. (Land Area - 19,929 sq. ft.). Secured by a third party charge. **Registered Owner** - M/s Priyamas Export Corp. Sdn. Bhd.

   (3) **Taman Yarl Property**

   Lot No. 1040, EMR 3955, Mukim of Petaling, District of Federal Territory. (Land Area 2.125 acres). Secured by a third party charge. **Registered Owner** - M/s Priyamas Export Corp. Sdn. Bhd.

   (4) **Puchong Property**

   Q.T.(M) 9 Lot No. 873 Mukim of Damansara, District of Petaling (Area - 3.594 acres). Secured by a third party charge. **Registered Owner** - M/s Priyamas Export Corp. Sdn. Bhd.

3. As settlement of the agreed outstanding sums it is agreed between the parties that the 4 properties referred to hereinbefore shall be dealt with in the manner hereinafter stated in extinguishment of the said agreed outstanding sums:-

   (1) (a) The said Ipoh Road property (refer paragraph 2(2) above) and the said Taman Yarl property (refer paragraph 2(3) above) property shall be transferred forthwith to he Bank and or its appointed nominees; **and**

(b) The Ukay Heights Property (refer paragraph 2(1) above) shall be transferred to the Bank or its appointed Nominee and the Receiver/Liquidator of Selvam Holdings Sdn. Bhd. shall execute all such documents as is necessary to validly effect the transfer;

and the Registered Owners of the said Ukay Heights Property, Ipoh Road Property and Taman Yarl Property do forthwith provide and deposit with the Bank duly executed Memorandum of Transfer, transferring the said properties to the Bank and its appointed nominees and the Senior Assistant Registrar of the High Court shall, if necessary, execute all such documents as is necessary to validly effect such transfer;

AND

(2) (a) that Priyamas Export Corporation Sdn. Bhd. or its appointed nominees shall have the right to redeem the Puchong Property (refer paragraph 2(4) above) from the Bank at an agreed redemption sum of $600,000.00 provided such redemption sum of $600,000.00 is fully paid to the Bank by either Priyamas Export Corporation Sdn. Bhd. or its appointed nominees on or before 12 noon on 25th April 1991 and the Bank shall deliver in exchange for the said payment, to the said Priyamas Export Corporation Sdn. Bhd. or its appointed nominees as the case may be, the document of title to the said Puchong Property together with a document discharging the charge of the Bank on the said Puchong Property.

(b) in the event Priyamas Export Corporation Sdn. Bhd. or its appointed nominees fail to pay the redemption sum of $600,000/- in full by 12 noon on 25th April 1991, then in that event, it is agreed that the Bank shall be at liberty to transfer the said Puchong Property forthwith thereafter to the name of the Bank and or its appointed nominees and the Senior Assistant Registrar shall execute all such documents as may be necessary to effect such transfer.

4. Upon due transfer and registration of the properties referred to in paragraph 3(1) and 3(2)(a) or (b) as the case may be, then in that event it shall be deemed that the agreed outstanding sums have been fully and duly extinguished and settled and there shall be no further claims whatsoever by the Bank or the parties herein against each other.

5. This Settlement Agreement shall result in discontinuance of all actions detailed in the Consent Order as if the said actions have been dismissed or discontinued and it is agreed that a copy of the Consent Order and this Settlement Agreement shall be placed in the files of each of such actions.

6. It is further specifically agreed:

(1) that upon executing of this Settlement Agreement and obtaining of the Consent Order, the caveats lodged on Lot No. CT 15374 Mukim of Ulu Semenyih, District of Ulu Langat (Kajang Property) namely:

(a) Caveat Presentation No. 5184/86 Jilid 67 Folio 126 Lodged by Priyamas Export Corporation Sdn. Bhd. of 1429 Jalan E3/13 Taman Ehsan, 52100 Kepong, Kuala Lumpur on the 19th day of August 1986; and

(b) Caveat Presentation No. 1310/87 Jilid 77 Folio 114 Lodged by Cecilia Sarah d/o J. Selvam IC No. 3110309 c/o Murthi & Partners on the 16th day of March 1987 as noted in Civil Suit No. 31-4147-86 shall be deemed discharged and removed and simultaneously upon execution of the Settlement Agreement the said Caveators Priyamas Export Corporation Sdn. Bhd. and Cecilia Sarah a/p J. Selvam shall deposit with the Bank duly executed documents signifying their consent to the withdrawal of the Caveats and the Senior Assistant Registrar of the High Court, if necessary, shall execute all such documents as may be necessary to effect the removal of the said Caveats.

(2) that the discharge and removal of the 2 caveats referred to in paragraph 6(1) above, shall facilitate and ensure the transfer forthwith thereafter of the Kajang Property to the trustees of Yu Hwa Chinese Primary School, Kajang and the Fixed Deposit of $795,093.75 plus interest thereon held by the Bank shall be released absolutely and unconditionally to the Bank.

7. Further it is agreed, all parties shall withdraw any allegations whatsoever of irregularities or impropriety made in any of the said Actions in the Consent Order, by any party against the other.

8. That Priyamas Export Corporation Sdn. Bhd. shall provide and deliver up a resolution of the Company at an Extraordinary General Meeting authorising and approving the terms herein pursuant to Section 132 of the Companies Act, 1965.

9. Save for the matters referred to in this Settlement Agreement and Consent Order, the parties confirm and undertake that there are no other claims, actions and proceedings whatsoever by or against any of the other parties hereto.

10. Lastly, there shall be no order as to costs.

Dated this 27th day of February 1991.

SIGNED by:

G. NADARAJAN AND KIM CHAT SEONG ON) (Signatures)
BEHALF OF BANK BURUH (M) BERHAD)
in the presence of:-

Sgd.
K.S. NARAYANAN
ADVOCATE & SOLICITOR
KUALA LUMPUR.

Advocates & solicitors

RECEIVERS AND MANAGERS OF) (Signatures)
SELVAM HOLDINGS (M) SDN. BHD.)
in the presence of:-)

sgd.
Paramjit Singh Gill
Advocate & solicitor
Kuala Lumpur.

Advocates & Solicitors

PRIYAMAS EXPORT CORPORATION) (Signature)
SDN. BHD. in the presence of:-)

Sgd.
PRASAD ABRAHAM
ADVOCATE & SOLICITOR
KUALA LUMPUR.

Advocates & Solicitors

CECILIA SARAH A/P P.J. SELVAM) (Signature)
FOR AND ON BEHALF OF THE)
MEMBERS OF HER FAMILY)
including J.L.J. SELVAM)
in the presence of:-)

Sgd.
PRASAD ABRAHAM
ADVOCATE & SOLICITOR
KUALA LUMPUR.

Advocates & Solicitors

CECILIA SARAH A/P J. SELVAM)
FOR AND ON BEHALF OF THE) (Signature)
CONTRIBUTORIES OF SELVAM)
HOLDINGS (M) SDN. BHD.)
in the presence of:)

Sgd.
PRASAD ABRAHAM
ADVOCATE & SOLICITOR
KUALA LUMPUR.

Advocates & Solicitors

PRIYAMAS EXPORT CORPORATION) (Signature)
SDN. BHD. AND CECILIA SARAH)
A/P J. SELVAM AS CAVEATORS)
in the presence of:)

Sgd.
PRASAD ABRAHAM
ADVOCATE & SOLICITORS
KUALA LUMPUR.

Advocates & Solicitors

The settlement agreement in originating summons F 31-4147-86 is in the nature of a global settlement covering 11 cases in all of which the plaintiff is involved only in cases nos. 8 and 9, that is, cases nos. F 693/82 and F 1444/83 respectively. Though in cases nos. 8 and 9, Lymas Development Finance Corporation Sdn. Bhd. was referred to as the party therein, PW1 gave evidence that there was a change of name to the present plaintiff on 31 March 1986 (see also Form 13 at p. 285 of the Appeal Record (Bahagian C). This is not disputed.

The consent order dated 1 March 1991 and the settlement agreement dated 17 February 1991 which the plaintiff purportedly tried to set aside, the parties are Selvam Holdings (M) Sdn. Bhd. (under liquidation) (as plaintiff), Priyamas Export Corporation Sdn. Bhd. (as defendant) and Bank Buruh (M) Berhad (as third party). In so far as the originating summons F 31-4147-86 is concerned, it is in respect of the discharge of charge of the property held under -

(1) Caveat Presentation No. 5184/64 Jilid 67 Folio 126 lodged by Priyamas Export Corporation Sdn. Bhd. off 1429 Jalan E 3/13, Taman Ehsan, 52100 Kepong, Kuala Lumpur on the 19th day of August 1986;

and

(2) Caveat Presentation No. 1310/87 Jilid 77 Folio 114 lodged by Cecilia Sarah d/o J. Selvam IC No. 3110309 c/o Murthi & Partners on the 16th day of March 1987.

It was also a term of the consent order that each of the proceedings listed therein numbered (1) to (11) shall be deemed to be dismissed or discontinued in terms of paragraph 5 of the settlement agreement as annexed. Paragraph 5 reads:

> This Settlement Agreement shall result in discontinuance of all actions detailed in the Consent Order as if the said actions have been dismissed or discontinued and it is agreed that a copy of the Consent Order and this Settlement Agreement shall be placed in the files of each of such actions.

At the outset we must point out that in trying to set aside the consent order the plaintiff failed to name all the parties in the settlement agreement in the proceedings before the learned judge. The counsel for the defendant at the early stage of the proceedings raised preliminary objection on this issue. However, as the counsel for the plaintiff replied that the plaintiff would be calling the relevant parties as witnesses the learned judge had overruled the preliminary objection. At the end of the trial none of the parties were called as witnesses and the learned judge (we think rightly so) then stated in his judgment that he tended to agree with the earlier preliminary objection of counsel for the defendant and hence invoked s. 114(g) of the Evidence Act 1950 against the plaintiff. The plaintiff's counsel's reply was that the agreed documents speak for themselves! Hence no need to call witnesses. With respect, we disagreed. The learned judge in his judgment at p. 14 of the Appeal Record Vol. 1 in overruling earlier on the preliminary objections said:

> ... the disputed facts should properly be evaluated at a trial.

We are of the view that the onus is on the plaintiff to call the relevant witnesses as promised for not citing all the parties in the settlement agreement to the present proceedings. The plaintiff could not act on behalf of the other parties who chose, so to speak, not to intervene in the application of the plaintiff to set aside the consent order and the settlement agreement. However, if the plaintiff is not a party to the settlement agreement and the consent order only then, as contended by the counsel for the plaintiff, that the rule of natural justice would have been breached and the High Court would have no jurisdiction to make the consent order affecting the rights of the plaintiff *(Toh Seow Ngan & Ors. v. Toh Seek Keng & Ors.* [1990] 2 MLJ 303). On the facts the plaintiff is estopped from challenging the validity of the settlement agreement and the consent order.

Be that as it may, the counsel for the plaintiff submitted that the learned judge should consider the issues as to the validity of the settlement agreement before the issue as to the jurisdiction of the court is to be determined as the plaintiff contended that the settlement agreement is void. The counsel for the plaintiff further contended that only then would the issue of whether estoppel arises can be determined.

In his judgment we observed that the learned judge was aware of the issues on the validity of the settlement agreement and consequently the jurisdiction to make a consent order. However, the learned judge was of the view that all the issues, among them the validity of the RM1.7 million, the bank guarantee, charges and debentures, the appointment of receivers and managers and liquidators, that the "(M)" in the company's name does not stand for "(Malaysia)" had been raised in the earlier proceedings which had been amicably and conclusively resolved between the parties as per the settlement agreement that resulted in the discontinuance of all the actions. Was the learned judge right in doing so?

We are of the opinion that the learned judge was right.

In *Ganapathy Chettiar v. Lum Kum Chun & Ors* [1981] 2 MLJ 45 the Federal Court held that an order by consent is evidence of a contract between the parties and is binding on all parties to the order all the more so, where there is not the slightest question of any mistake as to facts or law.

In *Khan v. Golechha International Ltd.* [1980] 1 WLR 1482 it was held that the principal issues already adjudicated upon could not be relitigated between the parties extended to **concessions** and **admissions** made in the Court of Appeal which led to dismissal of an appeal by consent for they were just as efficacious for the purposes of issue estoppel as a judgment delivered after full argument.

We are of the view that the consent did not in any way appeared to have been given under a misapprehension or from a mistatement or want of materials (see *Chee Kuan Cheng v. Chua Kong Kah* [1967] 2 MLJ p. 76).

The plaintiff freely gave its consent to the terms embodied in the settlement agreement in so far as they affect the interests of the plaintiff.

Therefore the question of the invalidity of the settlement agreement that was annexed to the consent order does not arise. Hence the learned judge was right in not making a ruling on the settlement agrement and the jurisdiction issues as the counsel for the plaintiff submitted that he should have done before considering the estoppel issue.

In any event, as the appeal is by way of rehearing, we will address on the legal issues relied on by the plaintiff, *viz.*:

(1) contravention of the National Land Code 1965;

(2) validity of the winding-up order against Selvam Holdings (M) Sdn. Bhd.

Contravention Of The National Land Code 1965

The plaintiff claims that in so far as the plaintiff's part in the settlement agreement is concerned, the same is void for being in contravention of the National Land Code 1965 based on the following grounds:

(a) the relationship between the plaintiff and the defendant prior to the settlement agreement being entered into was that of chargor and chargee;

(b) the plaintiff was under a liability to the defendant for debts owed by a third party. These debts were secured by third party charge over three pieces of lands belonging to the plaintiff.

It was submitted that the settlement agreement was an attempt to circumvent the provisions of the National Land Code 1965 which governs the rights and remedies of a chargor and a chargee. Therefore it was submitted that such an agreement would be void for being against public policy.

The short answer to that is to be found in the judgment of the Supreme Court in *MUI Bank Bhd. v. Cheam Kim Yu* [1992] 2 MLJ where at p. 642 it was held:

> ... under the Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty ...

It is to be noted that on the facts of this case, there had been no order for sale given by the court (other than the statutory notice issued by the chargee bank (defendant) on any of the charged property prior to the consent order). It is therefore well within the rights of the parties namely the chargors and the chargees and their authorised representatives in those circumstances, to enter into the settlement agreement by consent to deal with the release of those properties under the charge on agreed terms as was done in the settlement agreement and the consent order.

Validity Of The Winding-up Order Against Selvam Holdings (M) Sdn. Bhd.

Justice Dato' Abdul Aziz J, in *Selvam Holdings (Malaysia) Sdn. Bhd. v. Toby Lam (as receiver, manager and liquidator of Selvam Holdings (M) Sdn. Bhd. & Anor)* [1995] 1 AMR 139 conclusively decided that Selvam Holdings has been properly wound up and in those circumstances, the appointment of the liquidators and their subsequent actions are clearly valid and proper. This is what Dato' Abdul Aziz J said at p. 146:

> I find as a fact that the company that was ordered to be wound up on November 19, 1979, in Companies Winding-up No. 34/1979 was the applicant and I rule that the winding-up order was not rendered null and void and ineffective by reasons that it referred to the applicant as Selvam Holdings (M) Sdn. Bhd.

We are of the view that the learned judge in this case correctly accepted the judgment of Dato' Abdul Aziz J. It is not for the plaintiff to relitigate on the issue of the validity of the winding-up order and the appointment of the liquidators and their subsequent actions in the present proceedings. The proper course would be to appeal against the order of Dato' Abdul Aziz, J.

For the record, when PW1 was cross-examined regarding the word 'Malaysia' and the letter 'M' his answer at p. 276 of the Appeal Record Vol. 1, was:

> I am not making any fuss over it.

However, it would appear that the plaintiff is in fact trying to make a fuss now by claiming that it has the right to make a collateral attack on the judgment in the present proceedings!

To recapitulate, the plaintiff as one of the parties to the settlement agreement agreed that all twelve existing actions between the parties be set aside and discontinued and that there would be no further claims by any party. This is amply covered and agreed to in paras. 7 and 9 of the settlement agreement which read:

> 7. Further it is agreed, all parties shall withdraw any allegations whatsoever of irregularities or impropriety made in any of the said Actions in the Consent Order, by any party against the other.
>
> 8. ...
>
> 9. Save for the matters referred to in this Settlement Agreement and Consent Order, the parties confirm and undertake that there are no other claims, actions and proceedings whatsoever by or against any of the other parties hereto.

In this respect, the learned author to the *Doctrine of Res judicata*, 2nd Edn 1969 at p. 38 para. 42 stated:

> Any issue on question which is thus shown to have been recognised or taken by the parties as the subject of the litigation, and which appeared fundamental to the judgment or order agreed to, is deemed to have been thereby conclusively determined, so as to preclude any subsequent challenge.

We are therefore satisfied that there are no merits in the submissions of the counsel for the plaintiff.

For the reasons stated, the consent order and the settlement agreement are valid and enforceable and the plaintiff's action to set aside the consent order and the settlement agreement was rightly dismissed with costs by the learned judge.

We accordingly dismissed the appeal with costs. The deposit was ordered to be paid to the defendant on account of taxed costs.